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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1353

THOMAS E. KUYKENDALL,
Petitioner,

versus

SOUTHERN FARM BUREAU CASUALTY INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT SOUTHERN FARM BUREAU CASUALTY INSURANCE COMPANY

EDWARD R. FINCK, JR.
CLEMENS, SPENCER, WELMAKER & FINCK
1805 National Bank of Commerce Building
San Antonio, Texas 78205

Attorneys for Respondent

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner sued the Respondent Insurance Company for $11,121.08, the amount of an Agreed Judgment against Petitioner (which had not been paid at time of trial) and attorney's fees, each resulting from the settlement of a suit against him and his father for assault on one Guillen. Petitioner's father had joined with Petitioner to assert similar claims against Respondent. The father's claims were dismissed for lack of the requisite jurisdictional amount for Federal Court.

Guillen's suit was settled as to the father by the payment of Four Thousand ($4,000.00) Dollars in cash and as to Petitioner by allowing Guillen to recover a Judgment against him for Eight Thousand Two Hundred Fifty ($8,250.00) Dollars.

The Statement of the Case made by the Petitioner is correct, except as hereinafter set out.

The Release (Appendix E-1 through E-6 in the Petition) from the victim, Guillen, to Petitioner's father, C. R. Kuykendall, was not offered or received in evidence at the trial of this case.

Petitioner was a minor at the time of the shooting (June 19, 1971) and when the civil suit was filed by Guillen against him and his father (July 29, 1971).

Petitioner was an adult when the suit with Guillen was settled in October, 1973. (1st Supp. Rec. p. 46). Article 5923b, Texas Revised Civil Statutes.

Petitioner signed the Agreed Judgment personally as a part of the settlement of Guillen's suit. (Appendix F-3 to the Petition).

Petitioner testified as follows with regard to the settlement of Guillen's lawsuit:

Q All right, so you made a deal with Mr. Guillen, you and your daddy did, didn't you?
A Yes, sir.
Q At that time, at the time that the deal was

made, this was in about October of 1973, wasn't it?
A Yes, sir.
Q And at this time, you were over eighteen years of age, weren't you?
A Yes, sir.
Q And you agreed to it?
A Yeah.
Q You reached, you reached your majority at that time because of the law?
A Yeah.
Q And you agreed to it, right?
A Uh-huh.
Q Under that deal with Mr. Guillen, your daddy paid him Four Thousand Dollars in cash, didn't he?
A Yes, sir.
Q And you agreed to a Judgment against you for Eight Thousand Two Hundred and Fifty Dollars, wasn't it?
A Yes, sir.

(1st Supp. Rec. pp. 46-47)

* * *

Q All right, now you, when this case was settled for the Eighty-Two Hundred and Fifty Dollar Judgment, you haven't paid that, have you?
A No, sir.
Q And Mr. Guillen has made no effort to collect that Judgment from you, has he?
A No, sir.
Q And the criminal charges that were

brought against you were dismissed after you settled this civil suit, weren't they?

A Yes, sir.

Q Now that was part of the deal, he was to dismiss the criminal charges if, if you settled with him, wasn't it?

A Well —

Q — Isn't that right?

A Yes, sir.

Q And you did settle with him on the terms that we have said?

A Yes, sir.

(1st Supp. Rec. pp. 48-49).

Guillen, the victim, testified as follows concerning the settlement:

Q Now, when we ultimately settled the civil case that you had filed through Mr. Pena, your Attorney, was it thoroughly explained to you the settlement, the proposed settlement?

A Yes, sir.

Q Did your Attorney go into it thoroughly with you and did you understand it?

A Yes, sir, I understood.

Q And you understood that the Judgment was taken in your favor against Tom Kuykendall for Eight Thousand, Two Hundred and Fifty Dollars?

A The Judgment was against him for Twelve Thousand Five Hundred Dollars.

Q Well, you received Four Thousand Dollars in cash from Mr. Kuykendall, the other man, didn't you?

A Yes, sir.

Q And then you took a Judgment for Eight Thousand Two Hundred and Fifty Dollars against Tom Kuykendall?

A They gave me Four Thousand Dollars with the understanding that the rest, the other of the Twelve Thousand, they would collect from the insurance so that they would give it to me.

Q Yes, sir, now, insofar as the criminal complaint, you filed a criminal complaint against Tom, didn't you?

A Yes, sir.

Q And did you write a letter to the District Attorney of Webb County, Texas, requesting him not to prosecute that case?

A Yes, sir, because we had made this arrangement.

(1st Supp.Rec. pp. 171-173).

Petitioner's Father and Petitioner's Attorney both testified at the trial. Neither denied that the dismissal of the criminal charges and/or the promise to write a letter to the District Attorney requesting him not to prosecute the criminal charges was included in the settlement with Guillen.

ARGUMENT

I.

Instructed verdict was proper under the applicable law because there was no conflict in the evidence that the Petitioner's settlement with Guillen included a satisfaction of the civil claim and Guillen's promise to write a

letter asking that the criminal charges against Petitioner be dropped.

The test for the sufficiency of the evidence to create a jury issue in the Federal Court is a federal test — even though the substantive law applicable to the case is that of the state where the Federal Court sits. In this case, the substantive law would be the law of the State of Texas, but the federal law would determine the sufficiency of the evidence to create a jury issue. The test is set out in *Van Pendley vs. Fidelity and Casualty Company of New York*, 459 Fed. 2nd 251 (Fifth Circuit, 1972), in the following quotation:

> "While the underlying substantive law in this Erie case is that of the State of Texas, we apply a federal test for the sufficiency of the evidence to create a jury question. Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir., 1969). That test was articulated in Boeing as follows:
>
> 'On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. *On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question.* However, it is the function of the jury as the traditional finder of the facts, and not the Court to weigh conflicting evidence and inferences, and determine the credibility of witnesses.'
>
> 411 F.2d 365, 374-375." 459 Fed. 2nd at 254. (Emphasis added).

Further, Petitioner never denied, qualified or retracted his testimony that a part of the deal with Guillen was the dismissal of the criminal charges. This testimony is unequivocal. It is a judicial admission. *Griffin vs. Superior Insurance Company*, 338 S.W. 2nd 415 (Texas, 1960).

Whether or not the statement of the Petitioner is considered a judicial admission is not controlling. Petitioner testified that he agreed to the settlement. He personally signed the Agreed Judgment against him.

He was an adult at the time of the settlement (October, 1973) and at the time of the trial in which he gave his testimony (December, 1974).

The other party to the settlement agreement, the victim, Guillen, testified that he had filed criminal charges against Petitioner and wrote a letter to the District Attorney asking that they not be prosecuted ". . . because we had this arrangement." referring to the settlement.

Neither Petitioner's father nor Petitioner's Attorney, both of whom testified at the trial, denied that the arrangement with Guillen to get the criminal charges against the Petitioner dismissed was included as a part of the settlement.

There was no ". . . . . conflict in substantial evidence to create a jury question". *Van Pendley*, supra. There was no conflict at all. Petitioner and Guillen corroborated each other.

Both the Trial Court and Court of Appeals followed and correctly applied the applicable law in determining the sufficiency of the evidence to create a jury question.

II.

Texas law requires that where criminal and civil liabilities are settled, the insured must apportion the amount of the settlement between them before he can recover on his insurance policy.

The Trial Court and the Court of Appeals held that the Petitioner could not recover because he failed to apportion the settlement with Guillen between the criminal and civil matters.

Winn vs. Continental Casualty Company, 494 S.W. 2d 601 (Tyler, 1973, no writ history) is directly in point. In that case, the Plaintiff — insured — gave one Burkett $2,000.00 and a truck in consideration of the settlement of both civil and criminal exposures that resulted when Plaintiff claimed that he fired a warning shot in response to a disturbance and was later arrested on assault to murder charges. The Plaintiff sued his insurance carrier on an Owners', and Landlords' and Tenants' Liability insurance policy to recover the value of the settlement and attorney's fees. The Trial Court gave an instructed verdict for the Defendant insurance company. The Court of Civil Appeals affirmed and held that the instructed verdict was proper because the Plaintiff had failed to offer any evidence that apportioned the settlement between the settlement of the civil liability and the settlement of the criminal matter which would not be covered by the policy. The Court used the following language:

> "The burden rests upon the plaintiff-appellant to separate damages caused by things for which the defendant is liable under contract from those damages caused by things excepted under the contract * * *
>
> "In light of the foregoing authorities, appellant's failure to offer evidence apportioning the settlement payment between alleged "coverage" and admitted "non-coverage"

> justifies the trial court's legal conclusion that there was no evidence of probative force offered by appellant to support a recovery, and thereby supports the judgment of the trial court denying appellant any recovery".
> (494 S.W. 2nd at 606).

The distinctions pointed out by the Petitioner are distinctions without a difference. *Winn* is based upon the proposition that the insurance company should not be held liable for the amounts paid to settle the criminal matters. If the insured can apportion the amount of the settlement that is allocated to the criminal matter and the amount allocated to the civil matter, he may recover the latter from the insurance company. If he does not do so, he cannot recover anything.

The question of whether the agreement with Guillen concerning the criminal prosecution was legal or illegal is not material. The Courts below were not asked to enforce that agreement. The Courts below were being asked to enforce an insurance policy that would not cover consideration paid for the settlement of a criminal case.

All the Texas Court was doing in *Winn* and all the Courts below did in this case was to hold that the Plaintiff, in order to recover, would have to show how much of the consideration was paid for the settlement of the civil liability and how much was paid for the disposition of the criminal case. This is analogous to the situation in which a portion of a contract is illegal and the Courts enforce the remaining legal portion of the contract. See 13 Tex. Jur. 2d Contracts, Section 213 (pp. 430-431).

Petitioner makes the point that the Contract for the disposition of the criminal charge was void and that there was a complete failure of consideration. Petitioner overlooks the fact that the contract has been performed. Guillen got his Judgment against the Petitioner, wrote his letter to the District Attorney, and the charges were dismissed. The consideration has been exchanged. The contract is no longer executory. Hence, the insurance company could not be liable for that part of the consideration that would be applicable to the criminal matter. Under the undisputed evidence, a part of the consideration was applicable to the disposition of the criminal matter. Hence, it could not be argued that the consideration was solely for the release of the civil cases. That contention was made under the previous point by the Petitioner and has been demonstrated to be totally without merit.

CONCLUSION

The actions of the Courts below were in accordance with applicable Federal and State law. The case does not present any special or important reason for consideration by this Court. Hence, the Petition for Certiorari should be denied.

Respectfully submitted,

Edward R. Finck, Jr.
1805 N.B.C. Building
San Antonio, Texas 78205
Attorney for Respondent,
Southern Farm Bureau Casualty
Insurance Company

CERTIFICATE OF SERVICE

I, Edward R. Finck, Jr., Attorney of Record for the Respondent, do certify that I have served three copies of the above and foregoing brief on the Attorney of Record for the Petitioner by mailing the same to him first class, pre-paid, addressed as follows: J. G. Hornberger, 915 Victoria Street, Laredo, Texas 78040, all in accordance with Rule 33, Paragraph 1 of the Supreme Court Rules.

_____

Edward R. Finck, Jr.